FILE COPY

Office - Supreme Court, U. S.
FILED
APR 13 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

NOBLE C. POWELL,
Petitioner,
vs.
ROWLAND W. YOUNG,
Respondent.
No. 898.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOSEPH B. BELL,
Hayneville, Alabama,
and
RIVES & GOSSOLD,
RICHARD T. RIVES,
JOHN C. GOSSOLD,
Montgomery, Alabama,
Attorneys for Respondent.

St. Louis Law Printing Co., 415 North Eighth Street, CHestnut 4567.

INDEX.

Page

Opinion of court below 1

Statement of the case 1

Summary of argument 3

I. The Circuit Court of Appeals was correct in holding that indispensable parties had not been joined 3

II. The Circuit Court of Appeals was correct in holding that the petitioner had no cause of action, it belonging to the estate 4

Argument 6

I. The Circuit Court of Appeals was correct in holding that indispensable parties had not been joined 6

II. The Circuit Court of Appeals was correct in holding that the petitioner had no cause of action, it belonging to the estate 10

Conclusion 14

Appendix 17

Code of Alabama 1940, Tit. 61, Sec. 165 17

Cases Cited.

Atwood et als. v. National Bank of Lima, 115 F. 2d 861 (C. C. A. 6th, 1940) 4, 10

Brown v. Copeland, 206 Ala. 124, 89 So. 274 (1921) 4, 11

Calcote v. Texas-Pacific Coal & Oil Co., 157 F. 2d 216, 167 A. L. R. 413 n. (C. C. A. 5th, 1946), cert. denied 329 U. S. 782, 67 S. Ct. 205, 91 L. Ed. 671, rehearing denied 329 U S. 830, 67 S. Ct. 356, 91 L. Ed. 704 (1946) 3, 7

Crutcher v. Joyce, 134 F. 2d 809 (C. C. A. 10th, 1943) 3, 4, 6, 11

Horn v. Lockhart, 84 U. S. (17 Wall.) 570, 21 L. Ed. 657 (1873) 4, 9

Hudson v. Newell, 172 F. 2d 848 (C. C. A. 2d, 1949).... 7
Keegan v. Humble Oil Co., 155 F. 2d 971 (C. C. A. 5th, 1946) 3,8
Kentucky Natural Gas Corp. v. Duggins, 165 F. 2d 1011 (C. C. A. 6th, 1948)..... 3,8
Mancil et als. v. Thomas et als., 216 Ala. 623, 114 So. 223 (1927) 4,11
McArthur v. Scott, 113 U. S. 340, 395, 5 S. Ct. 652, 669, 28 L. Ed. 1015, 1032 (1885)..... 3,6
McNutt v. Bland et al., 43 U. S. (2 How.) 9, 11 L. Ed. 159 (1844) 4,11
Oxley v. Sweetland, 94 F. 2d 33 (C. C. A. 4th, 1948)..4,10
Payne v. Hook, 74 U. S. (7 Wall.), 425, 19 L. Ed. 260 (1869) 3,9
Roos v. Texas Co., 23 F. 2d 171, 172 (C. C. A. 2d, 1927) 3,8
Shields v. Barrow, 58 U. S. (17 How.) 130, 15 L. Ed. 158 (1854) 3,8
Simon v. Shaffer, 11 F. Supp. 450 (N. D. Okla., 1935). 4,11
Small v. Frick, 40 F. Supp. 778 (E. D. S. C., 1941) 4, 5, 11, 13
Trotter v. Brown, 232 Ala. 147, 150, 167 So. 310 (1936) 14
Waterman v. Canal-Louisiana Bank & Tr. Co. et al., 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80 (1909)..... 4,9
Williams v. Crabb et al., 117 F. 193, 50 L. R. A. 125 (C. C. A. 7th, 1902).....4, 9, 10
Young v. Powell, 179 F. 2d 147..... 1

Textbook Cited.

3 Moore's Federal Practice (2d Ed.):
Pp. 1303 and 1334.....4,11
Pp. 1365-66 11

Statute Cited.

Code of Alabama, 1940, Tit. 61, Sec. 165.....9,17

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

NOBLE C. POWELL,	Petitioner,	No. 688.
vs.		
ROWLAND W. YOUNG,	Respondent.	

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion in the United States Circuit Court of Appeals for the Fifth Circuit is now reported as **Young v. Powell**, 179 F. 2d 147.

STATEMENT OF THE CASE.

This case is one in which a citizen of Maryland seeks to enforce a cause of action on behalf of an estate being administered in the Court of Alabama. He brought his suit against an Alabama citizen, the donee of gifts made

by the decedent, seeking a decree that the gifts were invalid in their entirety, and asking that the donee be ordered to pour the proceeds of the gifts into the estate to be distributed according to the terms of the will. The petitioner who filed this suit is a residuary legatee of the estate. The estate, and persons who claim through it, had no representation in the suit; neither heirs, the other legatees, nor any personal representative of the estate, nor creditors.

Petitioner does not point out in his statement of the case that he also prayed in his bill for an accounting by the respondent to be made to the petitioner individually (R. 9, 10).

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals Was Correct in Holding That Indispensable Parties Had Not Been Joined.

Other legatees of the estate were indispensable parties, and since some of them were residents of Alabama, diversity of citizenship was destroyed and there was no federal jurisdiction.

McArthur v. Scott, 113 U. S. 340, 395, 5 S. Ct. 652, 669, 28 L. Ed. 1015, 1032 (1885);

Crutcher v. Joyce, 134 F. 2d 809 (C. C. A. 10th, 1943);

Calcote v. Texas-Pacific Coal & Oil Co., 157 F. 2d 216, 167 A. L. R. 413 n. (C. C. A. 5th, 1946), cert. denied 329 U. S. 782, 67 S. Ct. 205, 91 L. Ed. 671, rehearing denied 329 U. S. 830, 67 S. Ct. 356, 91 L. Ed. 704 (1946);

Keegan v. Humble Oil Co., 155 F. 2d 971 (C. C. A. 5th, 1946);

Kentucky Natural Gas Corp. v. Duggins, 165 F. 2d 1011 (C. C. A. 6th, 1948);

Shields v. Barrow, 58 U. S. (17 How.) 130, 15 L. Ed. 158 (1854);

Roos v. Texas Co., 23 F. 2d 171, 172 (C. C. A. 2d, 1927).

Cases relied on by the petitioner are not authority for the case at bar, for they involve suits by an individual in his own right, seeking relief for himself, usually against a personal representative of an estate for a fractional distributive share of assets held by him as fiduciary.

Payne v. Hook, 74 U. S. (7 Wall.) 425, 19 L. Ed. 260 (1869);

Horn v. Lockhart, 84 U. S. (17 Wall.) 570, 21 L. Ed. 657 (1873);
Waterman v. Canal-Louisiana Bank & Tr. Co. et al., 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80 (1909);
Williams v. Crabb et al., 117 F. 193, 50 L. R. A. 125 (C. C. A. 7th, 1902);
Oxley v. Sweetland, 94 F. 2d 33 (C. C. A. 4th, 1948);
Atwood et als. v. National Bank of Lima, 115 F. 2d 861 (C. C. A. 6th, 1940).

II.

The Circuit Court of Appeals Was Correct in Holding That the Petitioner Had No Cause of Action, It Belonging to the Estate.

Executors and administrators are real parties in interest, the legal title to personalty is vested in them, and those for whom they act can bring no suits against third persons indebted to the estate, or for an accounting.

McNutt v. Bland et al., 43 U. S. (2 How.) 9, 11 L. Ed. 159 (1844);
Small v. Frick, 40 F. Supp. 778 (E. D. S. C., 1941);
Crutcher v. Joyce, 134 F. 2nd 809 (C. C. A. 10th, 1943);
Simon v. Shaffer, 11 F. Supp. 450 (N. D. Okla., 1935);
Mancil et als. v. Thomas et als., 216 Ala. 623, 114 So. 223 (1927);
Brown v. Copeland, 206 Ala. 124, 89 So. 274 (1921).

Federal Rule of Civil Procedure 17 (a) covers this case, and it is a restatement of traditional equity practice.

3 Moore's Federal Practice (2d Ed.), pp. 1303 and 1334.

Petitioner acknowledges that the above is the general rule but attempts to take the present case out of the rule

by contending that it is not applicable where the action is by a legatee against a personal representative.

Petitioner's Brief, p. 14.

But respondent was not sued as personal representative. Respondent has throughout insisted that a personal representative of the estate had to be joined as an indispensable party, but petitioner has fought this contention.

Petitioner's Brief, p. 2.

The case of **Small v. Frick**, supra, is in point, indicating that a claim against one who holds assets received from a decedent and sought by his estate, and for an accounting, must be brought by the personal representative.

A cause of action seeking return of assets to an estate is a chose in action belonging to that estate.

Small v. Frick, supra.

ARGUMENT.

I.

The Circuit Court of Appeals Was Correct in Holding That Indispensable Parties Had Not Been Joined.

Three of the express legatees and two other residuary legatees are citizens of Alabama. They were indispensable parties, and had they been properly joined diversity of citizenship would have been destroyed, since the respondent is also a citizen of Alabama. The complete diversity required for federal jurisdiction would no longer have existed.

The general rule has long been that in suits affecting the rights of residuary legatees or next of kin all members of a class must be made parties.

McArthur v. Scott, 113 U. S. 340, 395, 5 S. Ct. 652, 669, 28 L. ed. 1015, 1032 (1885).

More specifically, one heir may sue a third party for an accounting where the estate has been closed, but other heirs are indispensable parties (note that in the present case one legatee sought an accounting from a third party when the estate was still open, and still did not join other legatees).

Crutcher v. Joyce, 134 F. 2d 809 (C. C. A. 10th, 1943).

Petitioner has sought enforcement of an indivisible right on behalf of all the estate. The Circuit Court of Appeals recognized this in its decision (R. 501):

> "No case is cited to us, we have found none, where, as here, one legatee has been allowed to maintain a

suit, in behalf of the estate and all the legatees, to cancel completely in their interest, acts and instruments done and executed by the decedent, and, upon cancellation, to recover the entire property for the benefit of the estate."

And at R. p. 503:

> "The very frame of the complaint, of the prayer, and of the judgment on it, is conclusive of the non-individual, the joint nature of the suit and of the relief demanded, and that plaintiff was without right to maintain the suit."

In considering the question of indispensability of absent parties, there always has been careful differentiation between suits involving a fractional or individual interest and those to cancel or set aside instruments or acts as to all concerned, and to gain relief on behalf of all. Petitioner has filed a suit of the latter nature but relies on authorities relating to the former type. The Fifth Circuit Court took this up in detail in its decision, especially discussing **Hudson v. Newell**, 172 F. 2d 848 (C. C. A. 2d, 1949), wherein it had been held that cancellation of deeds could not be decreed unless every person interested under them was before the Court. Certainly, petitioner cannot seriously contend that he is the only person interested in cancellation of the deed and gift here in question—the other legatees, the personal representative of the estate, the creditors, all are interested. None were joined.

In many cases it has been held that all persons holding fractional royalty interests or sub-leases of oil or gas or mineral leases are indispensable parties to actions to cancel the interests or leases.

Calcote v. Texas-Pacific Coal & Oil Co., 157 F. 2d 216, 167 A. L. R. 413 n. (C. C. A. 5th, 1946), cert. de-

nied 329 U. S. 782, 67 S. Ct. 205, 91 L. ed. 671; rehearing denied 329 U. S. 830, 67 S. Ct. 356, 91 L. ed. 704 (1946);

Keegan v. Humble Oil Co., 155 F. 2d 971 (C. C. A. 5th, 1946).

The Sixth Circuit Court of Appeals has held that in a suit by one heir to cancel or rescind a lease executed by the ancestor, or the ancestor's representative, the remaining heirs are indispensable.

Kentucky Natural Gas Corp. v. Duggins, 165 F. 2d 1011 (C. C. A. 6th, 1948).

It had been contended in that case that other heirs need not be joined because of the rule that one tenant in common may sue in ejectment to recover his interest in land without joining other tenants. In answering this the Court pointed out at 165 F. 2d 1016 the same distinction noted by the Fifth Circuit Court in the present case, that is, the difference between the individual suit for one's aliquot share, such as the tenant in common seeking his share of land, and the suit to enforce an indivisible and undivided right, such as the cancellation of an ancestor's lease. The petitioner here has never given a rational explanation of why he believes one legatee, with all of the others excluded, can sue to cancel a deed and a gift, while all must be joined to cancel a lease.

Similarly, rescission of a contract is generally not permitted unless all parties are joined. Nor can a contract be declared invalid as to some of the parties to it but not as to others.

Shields v. Barrow, 58 U. S. (17 How.) 130, 15 L. ed. 158 (1854);

Roos v. Texas Co., 23 F. 2d 171, 172 (C. C. A. 2d, 1927).

Petitioner discusses in his brief the Alabama statute dealing with appointment of an administrator ad litem, referring to it as the "Statute made so much of in the Circuit Court of Appeals."

> **Petitioner's Brief,** pp. 17-18;
> Tit. 61, Sec. 165, **Code of Alabama 1940.**

Actually, the Court referred to this statute in connection with one of respondent's contentions (R. 499), but does not base its decision upon this contention or even refer to the statute any further.

Before the Circuit Court the petitioner relied upon the same type case as he does here as authority that he may sue alone, but, as that Court pointed out, they are not in point (R. 501):

> "The cases appellee cites in support of his view, that he may sue alone, are not in point on their facts here. They are all cases where plaintiff sued, not for the benefit of others but for himself, to recover for himself his separate and divisible share. He was not enforcing an indivisible right of an estate or of his co-heirs. Those cases did not hold that a court could proceed in the absence of indispensable parties. They held that because of the separate and divisible nature of the plaintiff's demand in the particular case and the fact that the relief sought could not, and did not, affect the rights or liabilities of those not made parties, the cause could proceed to judgment and the relief sought could be granted, without their presence."

Payne v. Hook, 74 U. S. (7 Wall.) 425, 19 L. ed. 260 (1869); **Horn v. Lockhart,** 84 U. S. (17 Wall.) 570, 21 L. ed. 657 (1873); **Waterman v. Canal-Louisiana Bank & Tr. Co. et al.,** 215 U. S. 33, 30 S. Ct. 10, 54 L. ed. 80 (1909); **Williams v.**

Crabb et al., 117 Fed. 193, 50 L. R. A. 125 (C. C. A. 7th, 1902); **Oxley v. Sweetland**, 94 F. 2d 33 (C. C. A. 4th, 1938); **Atwood et als. v. National Bank of Lima**, 115 F. 2d 861 (C. C. A. 6th, 1940), all involved suits by an individual in his own right, seeking relief to himself, usually in the form of a suit against the personal representative of the estate for a fractional distributive share of assets held by him. None of these cases are authority that before an estate is settled one legatee can sue an alleged debtor of the estate, to enforce an alleged cause of action belonging to the estate, asking relief on behalf of the estate, while at the same time seeking an accounting to be made to him individually by a defendant who owes him no fiduciary obligation, with neither other legatees, nor any representative of the estate, nor any representative of the creditors of the estate being parties to the suit. As the Circuit Court states, petitioner has not cited any case indicating that a legatee has such a right.

II.

The Circuit Court of Appeals Was Correct in Holding That the Petitioner Had No Cause of Action, It Belonging to the Estate.

The Circuit Court of Appeals dealt unequivocally with petitioner's attempt to get around the real party in interest rules. Petitioner raised as his first contention there that a state rule requiring the real party in interest to sue is not binding on a federal court. The Court answered (R. 500):

> "We find ourselves in complete disagreement with appellee. The first proposition disregards the fact that Rule 17 (a) of the Federal Rules of Civil Procedure, Real Party in Interest, 'Every question shall

be prosecuted in the name of the real party in interest' is the substantial equivalent of the rule in Alabama and in most of the states."

It is fundamental law in Alabama, and almost everywhere else too, that executors and administrators are real parties in interest, the legal title to personalty is vested in them, and those for whom they act can bring no suits against third persons indebted to the estate, or for an accounting.

McNutt v. Bland et al., 43 U. S. (2 How.) 9, 11 L. ed. 159 (1844);
Small v. Frick, 40 F. Supp. 778 (E. D. S. C., 1941);
Crutcher v. Joyce, 134 F. 2d 809 (C. C. A. 10th, 1943);
Simon v. Shaffer, 11 F. Supp. 450 (N. D. Okla., 1935);
Mancill et als. v. Thomas et als., 216 Ala. 623, 114 So. 223 (1927);
Brown v. Copeland, 206 Ala. 124, 89 So. 274 (1921).

Rule 17 (a) was derived from Federal Equity Rule 37, which was a mere restatement of traditional equity practice, and effected no procedural changes.

3 Moore's **Federal Practice** (2d ed.), pp. 1303 and 1334.

The general introductory statement of Rule 17 (a), that every action shall be prosecuted in the name of the real party in interest, is followed by certain enumerated persons, including executors and administrators. The general interpretation of this has been that the enumeration is not an exception to the general rule but merely illustrative.

3 Moore's **Federal Practice** (2d ed.), pp. 1365-66.

Actually, petitioner concedes that the above law is correct, for he states (Petitioner's Brief, p. 14):

> "The general rule is that the personal representative is the only one authorized by law to sue on a claim relating to personal property belonging to an estate."

Then he attempts to escape the impact of the law by saying:

> "This rule has application only to actions against third persons who are indebted to the estate. This rule has no application to an action, as here, by a legatee against one who happens to be the personal representative of an estate for his delicts."

This argument winks at the facts (and it was raised before th Circuit Court without success), for the present suit **is** an "action against a third person who is indebted to the estate," and it **is not** an "action by a legatee against a personal representative of the estate for his delicts." Respondent received the gifts as an individual, held them as an individual, and was here sued as an individual. The caption of the case so reveals, and the whole tenor of the bill is directed against respondent as an individual donee. In fact, petitioner so acknowledged (Petitioner's Brief, p. 2):

> "The respondent is also the donee and the personal representative, but he was not sued in his representative capacity."

As a matter of fact, the last thing which petitioner has desired is for the personal representative to be in this case; almost since the suit was filed respondent has been strenuously contending that it was indispensable for some personal representative of the estate to be joined, that the case could not properly proceed without the estate's being represented (R. 21, 22), but the petitioner fought this tooth

and toenail because he feared that an administrator ad litem, or a new personal representative, who was a citizen of Alabama, would be joined, diversity of citizenship would be destroyed, and he would be out of federal court. Now he tells this Honorable Court that Rowland Young, in his capacity as personal representative, has been in the case all along! This simply is not true.

One of the clearest cases on the point is **Small v. Frick**, supra. Heirs at law sued, alleging that the defendant had obtained and occupied decedent's farm and received support from it and had received funds as committee for the decedent, who had been adjudged insane. An accounting was sought on both of these claims. The executor was not joined. The court held that the claims were choses in action of the estate, and that the heirs could have no relief because the executor alone could sue for an accounting of anything due to the estate. Joinder of the executor destroyed diversity of citizenship, so the case was dismissed. As petitioner points out in his brief, p. 15, the court distinguished the suit by an heir against the administrator for his delicts from the suit by an heir against a third party to collect debts due the estate with an existing administrator of the estate omitted.

There is no substance to petitioner's argument that the Circuit Court erred in saying that the $44,000 and the deed to the land were not assets of the estate because title had passed to the respondent. In the first place, the Circuit Court of Appeals did not state that the money and the land were assets of the estate or even discuss the point. Passing that point, even if title passed to the respondent, the cause of action seeking return of them was a chose belonging to the estate, and as such was one of its most valuable assets.

Small v. Frick, supra.

Petitioner's argument about an administrator ad litem will not be answered here at length, since the decision of the Circuit Court did not rest on the necessity for appointment of such representative of the estate to appear in the suit. But since the point has been raised, along with the argument that title to the money and property had passed to respondent, it should be noted that **Trotter v. Brown**, 232 Ala. 147, 150, 167 So. 310 (1936), upon which petitioner relies, is not in point, it involving an attempt by an administratrix to file a creditor's bill to set aside a conveyance alleged to have been fraudulently made by the decedent. The Alabama Supreme Court held that one in a representative capacity had no right to maintain such a bill and pointed out that the suit was not for the benefit of the decedent's estate, directly or indirectly, but merely a matter between a creditor and an alleged fraudulent transferee. That is not this case, where the very nature of the bill is to benefit the estate.

CONCLUSION.

We respectfully submit that the sound decision of the Circuit Court of Appeals for the Fifth Circuit correctly sets out the law, both on the holding that indispensable parties were not joined and the holding that petitioner had no cause of action.

The petition for writ of certiorari sets out four alleged reasons why the writ should be granted. The first two are, in substance, that the decision is in conflict with decisions of this Honorable Court and of other Circuit Courts of Appeal. Careful analysis of the cases to which petitioner refers shows that they are not in point, for they deal with enforcement of separate and divisible rights on behalf of an individual. The Court of Appeals pointed

this out, and while petitioner cites the same group of cases in Point A of his brief, he makes no attempt to meet this ruling of the Court or to explain why he thinks it is in error.

The third alleged reason, that the decision is in conflict with Alabama law, is directed at the point that the estate rather than the petitioner is the owner of the cause of action and only the personal representative can sue. Petitioner attempts to answer the Court of Appeals ruling on this point. He acknowledges that he is barred by the general real party in interest rule but attempts to escape it by citation of cases relating to suits by a legatee or heir against a personal representative in his fiduciary capacity. This is not such a suit, and petitioner knows it. Young, as an individual, was defendant, but Young, as executor, was carefully and intentionally omitted as defendant, and petitioner bitterly fought in the District Court the contention of respondent that a representative of the estate ought to be in the suit, in fact was an indispensable party.

This suit is no more than an officious intervention by a legatee into the affairs of an estate being administered by duly empowered courts of the State of Alabama. Reduced to simple terms, he seeks to enforce a cause belonging to the estate against one alleged to be indebted to it. If petitioner objects to actions of the personal representative the law of Alabama provides orderly and full procedure for his protection. But he cannot officiously take into his own hands the marshalling of assets, and make of the federal court a probate court merely because he and the alleged debtor are citizens of different states.

We respectfully say: that the Fifth Circuit Court of Appeals was correct in holding that (1) petitioner had no cause of action at all, and (2) even if he did have a right

to sue, he failed to join indispensable parties; that petitioner shows no reasons for granting of a writ of certiorari.

Respectfully submitted,

JOSEPH R. BELL,
RIVES & GODBOLD,
RICHARD T. RIVES,
JOHN C. GODBOLD,
Attorneys for Respondent.

APPENDIX.

"Sec. 165. **When Administrator ad litem appointed.**— When, in any proceeding in the probate or circuit court, or other court having equity jurisdiction, the estate of a deceased person must be represented, and there is no executor or administrator of such estate, or he is interested adversely thereto, it shall be the duty of the court to appoint an administrator ad litem of such estate for the particular proceeding, without bond, whenever the facts rendering such appointment necessary shall appear in the record of such case, or shall be made known to the court by the affidavit of any person interested therein."